

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEROMY SHEPARD
Claimant

VS.

SUPERIOR INDUSTRIES INTERNATIONAL, INC.
Respondent,
Self-Insured

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Docket No. 231,883

ORDER

Respondent appealed the June 30, 1999 Award entered by Administrative Law Judge Steven J. Howard. The parties waived oral argument that had been scheduled before the Appeals Board.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Sean M. Durr of Pittsburg, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges that he injured his back while working for the respondent in a series of traumas from September 27, 1997, through October 6, 1997. The Judge awarded claimant benefits for a five percent permanent partial general disability.

Respondent contends Judge Howard erred. It contends that claimant failed to prove that his back injury arose out of and in the course of employment. It argues the injury occurred when a co-worker lifted claimant to "pop" his back, an activity that respondent contends is horseplay. Although respondent's counsel stated during one of its depositions

that timely notice was not an issue¹ and respondent stipulated to notice in its submission letter, respondent now attempts to raise notice as an issue.

Conversely, claimant contends the Judge did not err and argues that the Award should be affirmed.

The only issues before the Appeals Board on this appeal are:

1. Did claimant injure his back in an accident that arose out of and in the course of his employment with respondent?
2. Was timely notice of accident an issue before the Administrative Law Judge?
3. If so, did claimant provide respondent with timely notice of the accident or injury?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Respondent manufactures cast aluminum wheels for automobiles. At the time of the April 1999 regular hearing, claimant had worked for the respondent for six and one-half years.
2. In late September 1997, claimant was working for the respondent as a Class A Lead Operator. That job required claimant to mold and handle approximately 200 aluminum wheels per eight-hour shift. The wheels weigh approximately 25-30 pounds and are extremely hot when they are taken from the molds. That job required claimant to bend and twist approximately 40-50 times per hour. In late September 1997, claimant was working 59 hours per week as he was regularly working 11- and 12-hour days.
3. On approximately September 26, 1997, claimant noticed his back was sore when he left work. Usually such pain resolved. But the next morning, the back pain was worse when claimant awoke. Despite having back pain, claimant went ahead and worked. That morning claimant told his team leader, Mr. Frank Greenwood, that he was having problems with his back. As the day progressed, so did claimant's low back symptoms. Mr. Greenwood also noticed that claimant was having difficulty keeping up with his work and suggested that he have his back popped. After unsuccessfully trying to obtain relief by stretching and twisting, claimant asked a co-worker, Mr. Leonard Harris, to lift him and pop his back. Shortly afterwards claimant sat down and could not get back up. Co-workers then assisted claimant off the casting deck and took him to the hospital emergency room.

¹ Deposition of Larry Goodall, April 29, 1999; pp. 18 and 19.

4. Claimant then began receiving treatment from Dr. F. Ronald Seglie, who placed him on light duty for a week and then released him to regular duty. Claimant tried to work but his back worsened. Dr. Seglie restricted claimant from working from October 6, 1997, to December 1, 1997.

5. The parties stipulated that claimant has a five percent whole body functional impairment due to his back injury. Work disability is not an issue as claimant has returned to work for the respondent.

6. The Judge found that claimant's work activities injured his back rather than the manipulation administered by Mr. Harris. The Appeals Board agrees and affirms that finding. Claimant testified that the lifting incident with Mr. Harris did not affect his symptoms. Both Dr. Seglie and board-certified orthopedic surgeon Edward J. Prostic, M.D., testified that they could not say whether the lifting incident caused any injury to claimant's back. Dr. Seglie testified:²

Q. (Mr. Durr) What significance is there with respect to the sudden onset of pain after the employee tried to pop his back, do you know?

A. (Dr. Seglie) I don't know. I mean, he had pain before that and then the employee tried to pop his back and he had pain afterward. Whether -- there's no way for me to judge whether it was the same amount of pain or anything had changed in that time.

Dr. Prostic testified:³

Q. (Mr. Unruh) It [the doctor's medical report] also said here and I'll quote, "He asked a friend to pop his back. He became significantly worse after the attempted therapy." So, it's also your opinion that after the friend popped his back, his injuries were increased; is that correct?

A. (Dr. Prostic) Well, his pain was certainly increased. I don't know whether or not his injury was increased.

7. At the regular hearing, the Judge stated that timely notice was an issue.⁴ At a later deposition, following an off-the-record discussion with claimant's attorney, respondent's counsel stated that notice was no longer an issue.

² Deposition of F. Ronald Seglie, M.D., April 27, 1999; pp. 12 and 13.

³ Deposition of Edward J. Prostic, M.D., April 2, 1999; pp. 11 and 12.

⁴ Regular Hearing, April 15, 1999; p. 4.

MR. PHALEN: Off the record for a second.

(An off-the-record discussion was had.)

MR. O'CONNOR: Sure, we'll agree that there is no notice defense being asserted in this case.⁵

. . .

MR. PHALEN: But if notice isn't an issue, then it's no big deal. I mean, if you're admitting that you have notice --

MR. O'CONNOR: Oh, yeah.⁶

Additionally, respondent's May 28, 1999 submission letter to the Judge indicates that respondent stipulated to timely notice.

CONCLUSIONS OF LAW

1. The Award should be affirmed.
2. Claimant injured his back working for the respondent performing repetitive lifting and twisting. The Appeals Board concludes that claimant's accidental injury arose out of and in the course of his employment with respondent.
3. Because claimant's back injury is an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides:

. . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the

⁵ Deposition of Larry Goodall, April 29, 1999; p. 18.

⁶ Deposition of Larry Goodall, April 29, 1999; p. 19.

percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . .

Because claimant recovered from his injury to the extent that he returned to work for the respondent, he has limited his request for permanent partial disability benefits to the stipulated whole body functional impairment rating. Therefore, claimant's permanent partial general disability is five percent.

4. The Judge did not list notice as an issue to be decided in this proceeding. And the Appeals Board agrees that it was not. Respondent's counsel stated that notice was not an issue and claimant was entitled to rely upon that representation. Because timely notice was not an issue before the Judge, that issue cannot now be raised in this appeal.⁷

5. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the June 30, 1999 Award entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Sean M. Durr, Pittsburg, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director

⁷ See K.S.A. 1999 Supp. 44-555c(a).